

EPA Region 8 Policy and Procedures for Implementation of the CERCLA Offsite Rule

I. INTRODUCTION

This document presents the policy and procedures used by EPA-Region 8 in implementing the Off-Site Rule (OSR) under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). It contains the purpose and history of the OSR, relevant national policy, roles and detailed procedures for its application in Region 8. Its primary audience is intended to be EPA program and State regulatory management and staff, and facility personnel involved in the transfer of wastes generated as a result of cleanup activities at CERCLA sites.

II. PURPOSE OF THE OFF-SITE RULE

The primary purpose of the OSR is to assure that CERCLA wastes that are federally transferred to off-site waste facilities are directed only to facilities that are determined to be environmentally sound. This is to assure that their wastes do not contribute to current or future environmental problems, particularly those that would require additional CERCLA response actions.

III. BACKGROUND

After CERCLA became law in 1980, EPA developed policy and guidance that addressed the transfer of CERCLA cleanup wastes. The goal of these early efforts was to assure that federally directed CERCLA wastes would go to facilities with waste management units determined to be environmentally sound, thereby avoiding the creation of future CERCLA sites.

In 1986, the Superfund Amendments and Reauthorization Act (SARA) formalized these policies into a statutory mandate at Section 121(d)(3), the Off-Site Rule. This section states that CERCLA wastes being transferred off-site shall be transferred only to facilities operating in compliance with Sections 3004 and 3005 of the Solid Waste Disposal Act (any other applicable Federal law). This language also requires that Land Disposal Units (LDUs) receiving CERCLA wastes must have no releases, and that other units at the facility must have no uncontrolled releases. Finally, these requirements direct EPA to notify receiving facilities of its determinations under this rule.

Subsequent to the statutory mandate, EPA developed national policies and procedures for enforcing the mandate, and set them into the National Contingency Plan (NCP), at 40 CFR 300.440. The regulatory requirements for implementing the OSR were finalized and published in the Federal Register at 58 FR 49200, on September 22, 1993.

IV. MAJOR FEATURES OF THE OFF-SITE RULE

A. *Basic Principles and Applicability*

As stated above, the primary intended purpose of the OSR is assure that CERCLA wastes are sent only to those facilities that are least likely to create future CERCLA sites. In this context, the OSR can be thought of as a business decision by EPA to minimize the risk of future releases requiring additional expense. Facilities with valid permits or licenses are authorized to receive certain types of wastes and have the opportunity to compete as a legitimate business for those wastes. But these permits do not create the right to receive any particular waste shipments from EPA, States, private parties, or other Federal agencies.

Because of its primary focus on controlling CERCLA wastes and where they're sent, EPA's implementation of the OSR can be thought of as controlling a spigot. The rule applies most directly to any remedial or removal action that is authorized or funded under CERCLA and involves the off-site transfer of any CERCLA wastes. The OSR forbids shipment of such wastes to facilities that do not meet the compliance and release criteria. The rule would not apply in situations where only State authority is being exercised.

The OSR does not apply directly to the receiving facilities. It is not a compliance or enforcement tool, and it contains no requirements that can be used to order a receiving facility to maintain or return to compliance. Rather it sets out certain business consequences for those facilities that do not meet the criteria for compliance and release. As court cases have held, it does not have the due process features of environmental enforcement authorities, and its use as an enforcement tool is strongly discouraged.

B. *Basic OSR Procedures*

1. The process is typically started with an inquiry (often from the manager of a CERCLA site, or a facility seeking to be designated "acceptable") about the OSR status of a particular facility.
2. EPA obtains and maintains facility-specific information to determine whether a facility is acceptable to receive CERCLA wastes, based on the compliance and release criteria discussed below. An affirmative determination of compliance and control of releases is necessary before a facility may be deemed acceptable for the receipt of CERCLA waste.
3. EPA notifies interested parties about the status of facilities. There are established procedures for notifying a facility that is unacceptable, including timelines and appeals processes.

4. EPA has established procedures for re-evaluating unacceptability determinations and returning it to acceptable status when it has addressed all outstanding issues.
- The EPA Regions are also required to determine the acceptability of facilities selected for the treatment, storage, or disposal of CERCLA waste. In actual practice, a facility that wishes to be sent CERCLA wastes can request a determination of acceptability for any treatment, storage, or disposal unit.

The scope of “compliance” includes applicable environmental laws (including State and Federal requirements, permits, licenses, and enforcement order or decrees). And where “control of releases” means that the facility enters into an enforceable agreement under those laws to conduct corrective action activities to control release.

Spigot

- When EPA finds that the facility is not operating in compliance with all applicable environmental laws, EPA is directed notify the owner/operator of the facility of the unacceptability finding (i.e., Notice of Unacceptability). These Notices usually provide the facility with 60-days before becoming effective. Units remain acceptable under a Notice until its effective date is reached.
- The OSR does not contain provisions for public meetings, notices, or hearings. Public comments can be submitted to the State/Federal agency or EPA program that regulates the facility.

C. Basic Roles

The OSR designates EPA as the agency that establishes the criteria and procedures for. Not delegable to states or other institutions.

More information on the roles of EPA and others in the implementation of the OSR can be found in Chapter VI.

D. OSR Criteria: compliance and releases.

As noted above, the two primary criteria for evaluating whether a facility is acceptable for receiving CERCLA wastes are compliance status and release status.

V. RELEVANT VIOLATIONS AND RELEVANT RELEASES

Section 121(d)(3) of SARA, requires that CERCLA waste shall only be transferred to facilities that meet the following two criteria. The compliance criterion requires the receiving facility to be in physical compliance with the Resource Conservation and

Recovery Act (RCRA), other applicable Federal laws, and State environmental laws. The release criterion prohibits transfer of CERCLA waste to a waste management unit releasing contaminants into the environment, and/or if any other waste management unit has releases which are not controlled.

A. Relevant Violations

Under the OSR, EPA reviews the compliance history of a potential receiving facility for relevant violations to determine if the unit/facility is in physical compliance with applicable environmental laws. The OSR broadly defines relevant violations in 40 CFR 300.440(b)(1)(ii) as; "*significant deviations from regulations, compliance order provisions, or permit conditions designed to: ensure that CERCLA waste is destined for and delivered to authorized facilities, prevent releases ... to the environment, ensure early detection, ... or compel corrective action for releases, and criminal violations which result in indictment*". Violations of applicable Federal and State environmental laws may be relevant and need to be evaluated on a case-by-case basis.

Facility-wide violations, as opposed to unit-specific violations, affect "the entire waste management operation (such as failure to comply with facility financial requirements, an inadequate closure plan, inadequate waste analysis plan, inadequate inspection plan, etc.)". Relevant facility-wide violations can render the entire facility unacceptable, including the receiving unit.

B. Relevant Releases

In determining whether a facility is acceptable to receive CERCLA wastes, EPA must assess not only the facility's compliance status, but also whether there have been releases at the facility or the substantial threat of a release. In evaluating actual and threatened releases, EPA may rely on any available information including required reports or unit design and operating characteristic descriptions. Another useful source of such information is a facility-wide investigation (e.g., a RCRA Facility Assessment [RFA] or a Preliminary Assessment/Site Investigation [PA/SI] for Subtitle C facilities) by the responsible agency. In short, a determination of a relevant release may be based on investigation sampling data results, required facility reports, the status of minimum technology requirements (MTR), or inferences made from other pertinent information.

Four criteria concerning releases must be satisfied before a facility can be approved for the receipt of off-site CERCLA wastes: (1) there can be **no** releases from Subtitle C receiving units including those regulated under the permit-by-rule provision; (2) all releases from non-receiving units at Subtitle C **land disposal facilities** must be controlled by an enforceable agreement for corrective action (the OSR Final Rule preamble policy is that the presence of a single land disposal unit at a facility constitutes a "land disposal facility"); (3) all releases from non-receiving Subtitle C **treatment and storage units** at

a facility that pose a significant threat to human health or the environment must be controlled by an enforceable agreement for corrective action; and (4) all "environmentally significant" releases from all non-Subtitle C facilities, such as Subtitle D and TSCA facilities (both receiving and non-receiving units), must be controlled by an enforceable agreement for corrective action. The term, "environmentally significant" is not defined, but is left up to EPA's discretion.

VI. UNIVERSE OF FACILITIES WHERE THE OSR APPLIES

VII. EPA RESPONSIBILITIES UNDER THE OFF-SITE RULE

Section 40 CFR 300.440(a)(4) of the OSR states:

"EPA (usually the EPA Regional Office) will determine the acceptability under this section of any facility selected for treatment, storage, or disposal of CERCLA waste. EPA will determine if there are relevant releases or relevant violations at a facility prior to the facility's initial receipt of CERCLA waste. A facility which has previously been evaluated and found acceptable under this rule (or the policy preceding policy) is acceptable until the EPA Regional Office notifies the facility otherwise pursuant to § 300.440(d)."

The first sentence above, designates EPA as the Agency responsible to make acceptability determination. The second sentence refers to EPA's obligation to make such determinations "prior to the facility's initial receipt of CERCLA waste" or the Initial Determination which is described below.

VIII. INITIAL DETERMINATIONS

An OSR Acceptability Determination is specific to the individual storage, treatment, or disposal unit that receives CERCLA waste at a facility. In some cases, a facility-wide violation or a relevant release may affect the OSR acceptability status of all receiving units (RUs) at a facility. For the sake of simplicity, individual storage, treatment, and disposal units at a facility selected to receive CERCLA wastes will be referred to as RUs.

EPA Region VIII conducts two types of determinations on RUs that are selected for receipt of CERCLA waste for the purposes of the OSR; (1) initial determinations and (2)

subsequent determinations. The process for subsequent determinations is provided for in Section 40 CFR 300.440(c) of the OSR. A discussion of the subsequent determination process is beyond the scope of this document. The criteria for acceptability determinations for various types of facilities are provided for in Section 40 CFR 300.440(b). In addition to these determinations, verifications of continued acceptability are periodically conducted to confirm that the facility remains acceptable. The verifications of continued acceptability are discussed below in Part V of this document.

An initial determination consists of in-depth investigations of the existence of relevant violations at the selected RU(s), facility-wide violations at the entire facility, and uncontrolled releases at the facility. Initial determinations are conducted on RUs for which EPA has never made an acceptability determination under the OSR. When an RU is determined to be acceptable, EPA will then issue to the facility a Notice of Acceptability for the RU and the appropriate State will be provide a copy of the Notice. Once EPA has determined that a RU is acceptable for the receipt of CERCLA waste under the OSR, the RU remains acceptable until EPA notifies the facility otherwise pursuant to § 300.440(d) of the OSR. As Regional policy, the initial determination is conducted upon request of the owner/operator(s) of the facility, prior to the facility receiving CERCLA wastes. An initial determination can also be requested by a PRP, OSC, or RPM, if the facility agrees to have an initial determination conducted by EPA.

IX. VERIFICATIONS OF CONTINUED ACCEPTABILITY

RUs found acceptable to receive CERCLA wastes following an initial determination are then subject to verifications of continued acceptability. EPA Region VIII will periodically verify, as appropriate, the acceptability of facilities that have been determined to be acceptable. The purpose of the verification of continued acceptability is to ascertain any changes in a facility's compliance status or releases, and to confirm that the facility continues to be acceptable.

Prior to this policy, the verification of continued acceptability process included the verbal confirmation from the appropriate State or Federal regulatory agency that no new violation or release has occurred; and the review of inspection reports as generated by a State, EPA, or other Federal Agency. As part of this policy for the purposes of the verification of continued acceptability, the Region is applying specific actions to implement OSR provisions such as inspections or site visits as part of the verification of continued acceptability process. The frequency of such inspections and visits are discussed below for Subtitle C, Subtitle D and other facilities.

X. TARGETING STRATEGY FOR OSR INSPECTIONS AT SUBTITLE C FACILITIES

Section 40 CFR 300.440(c)(3) provides EPA with the authority to undertake inspections, data collection and/or necessary assessments to implement the OSR. To augment

verifications of continued acceptability, EPA Region VIII will conduct OSR inspections at RCRA Subtitle C facilities following a frequency specified below. The primary purpose of these OSR inspections is to gather current compliance and/or release information to make an informed business decision as to whether facility continues to be acceptable for the receipt of CERCLA wastes. EPA will coordinate all OSR inspections with the State's Hazardous Waste program and will request its presence during these inspections.

1. These inspections may not used enforcement at the facility, only to assess the current compliance/release status of the facility, and support a determination as to whether the facility may receive CERCLA wastes.

A. OSR Inspections during Initial Determinations

While performing initial determinations for RUs that are proposed for the receipt of CERCLA waste at RCRA Subtitle C facilities, EPA Region VIII will conduct an **OSR inspection** in conjunction with the other investigative activities. These other investigative activities typically include reviewing the EPA RCRA facility file, contacting other appropriate EPA programs involved in regulating the facility, and corresponding with the State and/or Federal agencies which regulate the facility to request compliance information and information regarding the substantial threat of release of hazardous substances. Region VIII will coordinate all such OSR inspections with the State's Hazardous Waste program and will request the State's Hazardous Waste program presence during these inspections.

B. OSR Inspections as Part of Verifications of Continued Acceptability

As part of the verification of continued acceptability process, EPA Region VIII will conduct **one OSR inspection** per year at each Region VIII RCRA Subtitle C facility which has at least one RU that is acceptable under the OSR. Annual OSR inspections to update information on these RUs receiving CERCLA wastes are important to the effective implementation of the OSR program. These OSR inspections will be used to gather information to determine whether the RUs remain acceptable. Although the primary purpose of the OSR inspection is to gather information so that EPA can make an informed decision about the acceptability of the RUs, if violations are discovered during an OSR inspection, EPA Region VIII will inform the relevant State Agency and EPA Enforcement Program which may pursue violations under their enforcement program. All such OSR inspections will be coordinated with the State's Hazardous Waste program and their presence will be requested. A table listing the Regional Subtitle C

facilities currently considered acceptable under the OSR is provided as Attachment A.

In cases where a facility has been issued a Notice of Unacceptability for a receiving unit, EPA may conduct additional inspections or site visits to verify its return to compliance or resolution of release issues. Region VIII will request State Hazardous Waste program presence during these inspections or site visits.

XI. TARGETING STRATEGY FOR OSR INSPECTIONS AT SUBTITLE D FACILITIES

Although Section 40 CFR 300.440(c)(3) provides the necessary authority to undertake inspections, EPA Region VIII plans to conduct OSR site visits at Subtitle D facilities instead of inspections. A site visit for the purposes of this document is not an inspection, it is a non-enforcement tour of the facility, much like an audit or tour that may be conducted by a private business. Site visits will not be used to determine compliance at a facility, however an accompanying State or other Federal Agency personnel may conduct an inspection simultaneously. EPA will conduct OSR visits at RCRA Subtitle D facilities at the frequencies specified below. EPA will request State Solid Waste program presence during these OSR site visits.

A. OSR Visits during Initial Determinations

EPA Region VIII will conduct an OSR site visit as part of the initial determination for RUs proposed for the receipt of CERCLA waste at a RCRA Subtitle D facility. Other investigative activities will include corresponding with State and/or Federal agencies which regulate the facility to request compliance and other information regarding the substantial threat of release of hazardous substances. Region VIII will notify the State's Solid Waste program of EPA intent to conduct such OSR visits and will request its presence during site visits.

B. OSR Visits at Frequently Used Subtitle D Facilities

As part of the verification of continued acceptability process at each frequently used RCRA Subtitle D facility that has at least one RU that is acceptable under the OSR, EPA will conduct an OSR **site visit** each year. Region VIII will notify the State's Solid Waste program of EPA intent to conduct such OSR visits and will request its presence during site visits. A listing of frequently used Regional Subtitle D facilities currently considered acceptable under the OSR is found in Attachment A.

In cases where a facility has been issued a Notice of Unacceptability at a receiving unit, EPA may conduct additional site visits to verify return to

compliance or resolution of release issues. Region VIII will notify the State's Solid Waste program of EPA intent to conduct all such OSR site visits and will request its presence during these visits.

C. Site Visits at Infrequently Used Subtitle D Facilities

As part of the verification of continued acceptability process at each RCRA Subtitle D facilities that has at least one RU that is acceptable under the OSR which is "infrequently used" for storage, treatment or disposal of CERCLA waste, EPA will **not** conduct annual OSR site visits. An OSR site visit may occur if unusual circumstances or compelling reasons arise (e.g., shipments of a waste stream that raises interest or concerns, or the issuance of an Notice of Unacceptability). If an OSR site visit is needed, the Region will notify the State's Solid Waste program of EPA intent to conduct such OSR visits and will request their presence. A list of current infrequently used Regional Subtitle D facilities is also listed in the table in Attachment A.

XII. OSR SITE VISITS AT NON-RCRA FACILITIES

For the purposes of this document, facilities which do not accept wastes regulated under either RCRA Subtitle C or D, are designated "non-RCRA" facilities. Although Section 40 CFR 300.440(c)(3) provides the necessary authority to undertake inspections, EPA Region VIII plans to conduct OSR site visits at non-RCRA facilities which have RUs proposed to receive CERCLA wastes. Uranium mills which are regulated under the Atomic Energy Act (AEA) of 1954 are examples of non-RCRA facilities. The frequency of the OSR visits at these facilities is specified below. The Region will also notify the State and/or Federal regulatory agencies which regulate the facility of EPA intent to conduct such OSR site visits.

A. Initial Determinations

While performing initial determinations for RUs that are proposed for the receipt of CERCLA waste at non-RCRA facilities, EPA will conduct an OSR site visit in conjunction with the other investigative activities. Other investigative activities include corresponding with the State and/or Federal agencies which regulates the facility to request compliance information and information regarding the substantial threat of release of hazardous substances. The Region will notify the State and/or Federal agencies which regulates the facility of EPA intent to conduct such OSR visits.

B. Verifications of Continued Acceptability

As part of the verification of continued acceptability process for non-RCRA facilities that has at least one RU that is acceptable under the OSR, EPA will conduct an OSR site visit each year. The Region will notify the State and/or Federal agencies which regulates the facility of EPA intent to conduct such OSR visits. Regional facilities not regulated under RCRA Subtitle C or D and which are currently considered acceptable under the OSR are provided in Attachment A.

In the cases where a non-RCRA facility has been issued a Notice of Unacceptability, EPA may conduct additional site visits to verify return to compliance or resolution of releases. The Region will notify the State and/or Federal agencies which regulates the facility of EPA intent to conduct such OSR visits.

XIII. OTHER INFORMATION NEEDED FOR VERIFICATIONS OF CONTINUED ACCEPTABILITY

A. Information Generated by the States Needed by EPA

The success of a highly effective OSR program strongly depends on the compliance and release information of facilities with acceptable RUs that receive CERCLA waste. The facilities with acceptable RUs that receive CERCLA waste are listed in Attachment A. Listed below is relevant State information for such facilities the Region has identified as necessary to verify that a facility remains acceptable under the OSR (EPA Region VIII is requesting a courtesy copy):

- Notices of Violation (NOV) and Notices of Violation/Orders for Compliance (NOV/CO) issued by the State;
- Notices of Inspection (NOIs) that are generated during an inspection at facilities;
- Inspection reports;
- Warning letters;
- Consent Orders; and
- Compliance Advisories.

The Region plans to work with individual States to develop a procedure which will identify timing of the release of such information when an OSR determination is required.

B. Information Generated by Facilities with Acceptable RUs

The success of a highly effective OSR program strongly depends on the compliance and release information of facilities with acceptable RUs that receive CERCLA waste. The Region has identified the information it needs from these

facilities in order to verify that a facility remains acceptable under the OSR. EPA can either receive the information listed below for the RCRA Subtitle C facilities which have acceptable RUs (see Attachment A) from the appropriate state, or EPA may contact these facilities to receive this information:

- Facility correspondence dealing with self-reported violations or non-compliance;
- Correspondence dealing with an imminent hazard situation;
- Facility responses related to NOV and NOV/COs issued by the State;
- Facility responses related to Consent Orders; and
- Other information that EPA will identify on a case-by-case basis (e.g., analytical data when evaluating releases).

C. Information that EPA will provide the State Regulatory Agencies

EPA believes that it is essential for the off-site acceptability process to take into account the important role of the states. The Region will strive to make States active participants in OSR determinations, since the states often have the most direct responsibility over the receiving facilities. EPA will routinely copy the State on all compliance and enforcement information when correspondence is sent to the facility. EPA will consult with Region 8 states prior to issuance any Notices of Unacceptability. This consultation, usually through a conference call, is used to assist EPA in making its determination as to whether a violation and/or release is relevant under the OSR. A conference call will also be used for the following: to notify the State of EPA Region VIII's preliminary determination subject to change based on information received from the State; to obtain additional information and clarification from the State; and to note State views regarding the relevancy of the violations/releases and the necessity of a Notice issuance. In addition to the requisite consultation with the State, EPA will provide the following to the state agencies that regulate the facility:

- A draft copy of the Notice of Unacceptability that EPA plans to issue for review as a means to solicit comments dealing with the factual correctness and technical accuracy;
- A copy of the final Notice of Unacceptability just prior to issuance to the facility;
- An open invitation to all OSR meetings between EPA and the affected facility;
- A copy of all correspondence that EPA receives from the facility that is related to a Notice of Unacceptability, and
- A copy of all correspondence that EPA sends to the facility regarding the OSR.

XIV. REGULATORY ROLES:

A. The Role of the Regional Off-Site Contact

The ROC serves as the point of contact linking the On-Scene Coordinators (OSCs), the Remedial Project Managers (RPMs), and other interested parties with the proposed receiving facility. The role of the ROC is to respond to requests for information regarding off-site determinations and to conduct investigations regarding release and compliance criteria for potential off-site facilities.

Depending upon the determination to be made, the ROC will either make the decision or use the results of the investigation to make a recommendation to management. The ROC has the responsibility to draft correspondence that notifies the facility of the determination. The ROC also maintains records regarding the facilities being investigated.

B. The Role of the Office of Regional Counsel

In general, each Office of Regional Counsel designates an attorney who functions as the legal contact for OSR issues. The ROC and, when necessary or appropriate, others in the regional office, consult with the attorney on legal issues raised by determinations of acceptability and unacceptability under the OSR. The ROC should consult with the attorney before the regional office finalizes any OSR determination. Specifically, the attorney may assist in determining whether a facility's action or inaction constitutes a violation and whether a specific violation is relevant, and also may assist in resolving other issues as needed.

Additionally, the attorney may review correspondence concerning such determinations before that correspondence is sent to a facility, and should review any administrative records prepared in connection with any OSR determination. The attorney also is likely to be called upon to answer questions of other regional personnel about the implementation of the OSR.

C. The Role of the OSC, RPM, or Other Person Subject to the OSR

The role of the OSC, RPM, or other person subject to the OSR is to learn from the ROC whether the facility which is proposed to receive CERCLA waste is acceptable under the OSR. It is also the responsibility of the OSC, RPM, or other person to determine if the OSR is applicable for the waste in question (e.g., is the action Fund-financed, is it a CERCLA waste,?)

Before transferring CERCLA wastes off-site, the OSC or RPM should inform Regional Superfund management of the transfer as early as possible. This will enable Regional Superfund management, at its discretion, to coordinate in advance with the appropriate State, Tribal, and local officials, and reduce the potential for controversy. If the proposed receiving facility is in another Region,

the OSC or RPM (or EPA contractor) should coordinate with that Region's ROC to ensure the receiving Region's management can also be informed.